IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO CARGILL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT (DKT. #2079)

TABLE OF CONTENTS

Federal Cases

Statutes

Other Authorities

Plaintiff, the State of Oklahoma ("the State"), respectfully requests that Defendants Cargill, Inc. and Cargill Turkey Production, LLC's (hereinafter collectively "Cargill Defendants" or "Cargill") Motion for Summary Judgment and Memorandum in Support [Dkt. #2079] ("Motion" or "MSJ") be denied in its entirety.

Statement of Disputed Material Facts

For the purposes of the Cargill Defendants' MSJ, the State disputes the following facts upon which the Cargill Defendants base their arguments. Omitted numbers signify facts that are not disputed for purposes of this Response.

2 & 3. Poultry litter, also known as poultry waste, consists of poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation. *See* 2 Okla. Stat. § 10-9.1(B)(21). Poultry waste contains large amounts of phosphorus. *See* Dkt. #2076-12 (1997 Tyson Environmental Poultry Farm Management, p. 3). It also contains the bacteria *E. coli*, *Salmonella* and *Campylobacter*. *See* Ex. 1 (Teaf P.I. Test., pp. 205 & 207); Ex. 2 (Lawrence P.I. Test., pp. 1169-70); Ex. 3 (Harwood P.I. Test., p. 642).

The Cargill Defendants' contracts do not transfer title of the poultry waste to their growers. *See* Dkt. #2065-4 (Taylor P.I. Test., p. 938); Dkt. #2070-7 (Taylor 7/15/08 Dep., pp. 132-34); Dkt. #2070-8 (5/14/09 Taylor Aff. ¶ 15). The Cargill Defendants supply the bedding material to their growers. Ex. 4 (Schwabe Depo., pp. 43-44; 75-77).

Defendants -- including the Cargill Defendants -- exercise control over their contract growers and all essential aspects of poultry production. *See* Dkt. #2065-4 (Taylor P.I. Test., pp. 929-35, 940-44); Dkt. #2119-24 (2001 Atty. Gen. Op. 17, ¶ 11). The Cargill Defendants own the birds, *see* Dkt. #2079 at 1; own and supply the feed the birds eat, *see* Dkt. #2066-5 (Maupin

Dep., pp. 142-43); decide when the birds are delivered, *see* Dkt. #2066-8 (Schwabe Dep., p. 47); decide the number of birds delivered, *see* Dkt. #2066-10 (Alsup Dep., p. 261); regularly inspect and supervise the growing operations, *see* Dkt. #2070-1 (Alsup Dep., pp. 29-31 & 35); Dkt. #2066-5 (Maupin Dep., pp. 150-52); dictate where growing operations are located, *see* Dkt. #2070-1 (Alsup Dep., p. 58); and specify poultry house clean-outs / cake-outs, *see* Dkt. #2070-1 (Alsup Dep., pp. 45-48, 52-53); Dkt. #2125-7 (at CARTP000391-392) (*Filed Under Seal*). The flock-to-flock structure of the grower contracts underscore the control Defendants have, as Defendants can decline to deliver new birds to a grower. *See* Dkt. #2065-4 (Taylor P.I. Test., pp. 933-35). The Cargill Defendants' contracts with the growers are generally non-negotiable. *See* Dkt. #2066-5 (Maupin Dep., p. 21). In sum, Defendants -- including the Cargill Defendants -- have oligopsony power over the growers. *See* Dkt. #2065-4 (Taylor P.I. Test., pp. 941-43); Dkt. #2070-7 (Taylor Dep., p. 29). Additionally, Cargill "Flock Evaluation" documents specifically demonstrate the Cargill Defendants' control over the poultry waste disposal activities of the contract growers. Ex. 5 (CARTP010911, *et seq.*) (*Filed Under Seal*). Defendants, including the Cargill Defendants, have used their economic control over the growers to shift their environmental costs from themselves to the growers. Ex. 20 (6/09 Taylor Decl., ¶¶ 34-40). Lastly, as shown by the *City of Tulsa* settlement, Defendants -- including the Cargill Defendants -- have the ability to control the growers and the disposal of the poultry waste. *See* Dkt. 2070-10 (Tolbert P.I. Test., pp. 94-95); Dkt. #2070-11 (*City of Tulsa* Consent Decree at pp. 8-9).

6 & 7. The presence of a Nutrient Management Plan or Animal Waste Management Plan does not assure compliance with Oklahoma's statutory requirements. Dkt. #2081-8 (Gunter Depo., pp. 175-79 & 180-81); Dkt. #2081-9 (Parrish Depo., pp. 140 & 152-53). Ex. 6 (Littlefield Depo. p. 107). Poultry waste applied by growers or applicators in a manner that is

consistent with such a Plan can still result in runoff. Ex. 7 (Littlefield P.I. Test., pp. 2016-17). Dkt. #2088-11 (Chaubey Depo. p. 168); Ex. 8 (Parrish Depo. p. 94, 199, 259); Dkt. #2103-4 (Cargill Turkey Products Contract Grower Environmental Best Management Practices Guide, p. CARTP 000009 (*Filed Under Seal*).

8. The Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") does not have the resources to determine with any degree of certainty if there are violations of the Poultry Feeding Act. *See, e.g.*, Ex. 8 (Parrish Dep., pp. 14, 19, 199 & 258). Nonetheless, ODAFF has found at least one Cargill grower to be in violation of the Oklahoma Registered Poultry Feeding Operations Act laws and rules. *See* Ex. 9 (1/24/02 Letter from Sutton to Doyle). Prior to this notice of violation, ODAFF instructed this same Cargill grower not to spread any more poultry waste on a field due to his soil test results. Ex. 10 (1/4/00 Letter from Parrish to Doyle). ODAFF has also generated a database that shows several Cargill grower violations noted during inspections. Ex. 11 (Gunter Depo., pp. 101-04; Depo. Ex. 23).[1] Cargill's own "Flock Evaluation" documents show that Cargill itself has discovered what amount to violations of Oklahoma law. Ex. 5 (CARTP010911, *et seq.*) (*Filed Under Seal*). Additionally, available soil test data indicate that Cargill growers have disposed of poultry waste within the Illinois River Watershed ("IRW") far in excess of any agronomic needs of the vegetation such that migration of the waste into the waters of the IRW is assured. *See* Stat. of Disp. Facts, ¶ 9, *infra.*

9. The State's evidence demonstrates that runoff and/or infiltration from poultry waste generated by Cargill's birds have contributed to widespread pollution of the waters of the IRW. First, the evidence establishes that millions of birds owned by the Cargill Defendants have been raised in the IRW. *See* Dkt. # 2065-20 (Cargill Inc.'s Second Supp. Answer to Int. 1);

[1] The Cargill growers in the database are Ernest Doyle and Clyde Masters.

2065-21 (Cargill Turkey's Second Supp. Answer to Int. 1). The State has identified active poultry houses, linked each of the active poultry houses to a specific Defendant (including the Cargill Defendants) and shown that these poultry houses are located throughout the IRW. *See* Dkt. #2076-6 (State's P.I. Ex. 113); Dkt. #2076-7 (State's P.I. Ex. 397). The State has further shown that birds owned by Cargill annually generate massive amounts of poultry waste within the IRW. *See* Dkt. #2076-8 (5/14/09 Engel Aff., ¶ 6). From 2001 through 2006, birds owned by the Cargill Defendants generated 275,713 tons of poultry waste in the IRW. *Id.* Collectively, Defendants' birds generate between 354,000 tons and more than 500,000 tons of poultry waste annually in the IRW. *Id.* at ¶¶ 6-11.

The evidence establishes that the Cargill Defendants are aware that it has been the practice to apply the poultry waste generated by their birds to the land in the IRW. *See, e.g.*, Dkt. #2081-5 (12/5/04 advertisement by several Defendants, including Cargill). The vast majority of this poultry waste is land applied in close proximity to the active poultry houses where it is generated. *See* Dkt. ##2081-12 (Engel P.I. Test., pp. 446-67); 2076-2 (Fisher Depo., pp. 158-60); 2088 (3/5/09 Fisher Aff., ¶ 5); 2076-11 (Daniel Depo., pp. 26-27); 2081-4 (Chaubey Depo., p. 35).

The primary method of disposal of poultry waste is land application. Dkt. #2081-4 (Chaubey Depo., pp. 32-33). Poultry waste is the dominant source of phosphorus loading in the watershed. *See id.* at 74-75; Dkt. #2100-4 (Smith 9/10/08 Depo., p. 41); Dkt. #2100-5 (Smolen 3/27/09 Depo., pp. 138-39). Significant amounts of poultry waste from *each* Defendant's birds -- including the Cargill Defendants' birds -- have been land applied within the Oklahoma portion of the IRW. *See* Dkt. ##2088-4 (Table 8 to Fisher Report); 2076-2 (Fisher 9/3/08 Depo., pp. 184-93) (testimony regarding Table 8 to Fisher Report).

At a soil test phosphorus ("STP") level of 65 lbs/acre or higher, there is virtually no agronomic benefit gained from applying additional phosphorus. *See* Dkt. #2088-7 (Zhang Depo., p. 189). Land application of poultry waste on fields with an STP of 120 lbs/acre constitutes disposal of poultry waste without benefit to crop production and with an increased risk to water quality by runoff and erosion. *See* Dkt. #2088-10 (OSU, PT 98-1, p. 5). *See also* Dkt. #2088-11 (Chaubey Depo., pp. 231-35). High STP levels are indicative of the over-application of poultry waste. Dkt. ##2088-11 (Chaubey Depo. at 175-76); 2088-9 (Johnson Rpt., ¶ 7(e) and (i)).

Available STP data shows that the majority of fields linked to Defendants are in excess of the disposal threshold of 120 lbs/acre STP. Ex. 12 (Fisher Decl., ¶ 11). All but one of the Cargill (trade name "Honeysuckle White") grower fields on the Oklahoma side of the IRW (for which data was available) reflect STP levels over 120 lbs/acre. *See* Attachment A to Ex. 12. This available data shows many Cargill grower fields are saturated with phosphorus with STP levels of 1,424, 1,063, 884, 811, 735, 725 and 468 lbs/acre. *Id.* Additional data generated by Oklahoma State University shows extremely high STP levels on another Cargill grower's fields in the IRW. Ex. 13 (Schwabe 3913, 3939, 3954, 3966) (*Filed Under Seal*). Soil test data from Cargill's own "breeder farms" in Arkansas also reflect high STP levels. Ex. 14 (Breeder Farm NMP) (*Filed Under Seal*).

The surface water and groundwater of the IRW are highly susceptible to phosphorus and bacteria pollution from land applied poultry waste because of the terrain and geology of this area, the manner of land application and the nature of poultry waste. *See* Dkt. #2088-6 (5/14/09 Fisher Aff. ¶¶ 7-27). "[L]and application of poultry waste to the karst terrain of the [IRW] means that constituents of this waste…travel readily through the soils and underlying geologic media to

discharge at and into ground water springs and surface streams throughout the [IRW]." *Id.* at ¶ 12. "[D]issolved material derived from poultry waste will also move with the runoff and pollute surface water." *Id.* at ¶ 27.

As demonstrated in the State's Motion for Partial Summary Judgment (Dkt. #2062) and exhibits, there are numerous and varied sources of evidence that establish that land-applied poultry waste and its constituents are in fact transported from fields to surface and groundwater in the IRW. *See, e.g.*, Dkt. ##2080 & 2080-3 (USDA Farm Service Agency (August 2007), pp. 16 and A-5-A-6); 2084 & 2084-2 (USDA Farm Service Agency (July 2006), pp. 18-19, 40); 2100 (USGS (2006), p. 4); 2104-6 ("Focus on Phosphorus" Proceedings, p. 8); 2102-7 (D. Storm Depo., pp. 47; 106); 2100-5 (Smolen Depo., pp. 138-39); 2103-4 (Cargill Contract Grower Environmental Best Management Practices Guide, p. CARTP000009) (*Filed Under Seal*); 2081-5 (12/5/04 advertisement); 2070-9 (3/27/98 memo from Mullikin to Henderson); 2103-5 (GE35775); 2103-6 (9/8/97 letter from Poultry Federation to *Tulsa World*); 2076-2 (Fisher Depo., pp. 113-17). Indeed, the evidence shows that "[p]oultry waste land application in the IRW is a substantial contributor, paren, 45 percent between 1998 and 2006, and 59 percent between 2003 and 2006, closed paren, to P loads to Lake Tenkiller representing the largest P source." Dkt. #2103-7 (Engel Depo., pp. 29-30 & 87-88).

Dr. Indrajeet Chaubey, a nonretained expert who has extensively studied nutrient transport in the IRW, has testified that: (a) "there will <u>always</u> be some losses taking place from the areas…treated with the poultry waste"; and (b) "[p]oultry litter is the biggest source of nutrients [in the IRW] when you look at all the sources, and given that fact and given the fact that it runs off the fields, it will be logical to conclude that significant amount of phosphorus in the [Illinois] river is coming from the areas that are treated with poultry litter." Dkt. #2088-11

(Chaubey Depo. at 168, 163-64) (emphasis added). Defendants' own expert, Dr. John Connolly, has testified that all of the studies he looked at conclude that phosphorus runs off fields to which poultry waste has been applied, that the run-off concentrations are substantial compared to reference fields and that he has not identified any study where poultry waste has been applied that phosphorus did not run off the field. *See* Dkt. #2100-3 (Connolly Depo. at 235-36).

Lastly, there are excessive amounts of phosphorus and bacteria in recreational water bodies in the IRW such as Lake Tenkiller and the Illinois River. *See, e.g.,* Dkt. #2084 (USDA Farm Service Agency (July 2006), pp. 18-19); Dkt. #2100 (USGS (2006), p. 20); Dkt. #2076-4 (AWRC (2002), p. 11).

11. It is irrelevant as a matter of law whether any of the State's investigators actually witnessed runoff from any Cargill-related facility. The State's evidence demonstrates that runoff and/or infiltration from poultry waste generated by Cargill's birds has contributed to damage to the waters of the IRW. *See, e.g.,* Stat. of Disp. Facts, ¶ 9, *supra.* Further, the State's investigators have observed the spreading of poultry waste which originated at a Cargill growers' farm. Ex. 15 (OK-PL-0005661 & OK-PL-0005666).

12 & 13. The Cargill Defendants cite the unsworn expert report of Brian Murphy ("Dr. Murphy"), a proffered expert witness. *See* Dkt. #2092-4. Unsworn expert reports are not admissible under Rule 56(e) to support or oppose summary judgment. *See Sofford v. Schindler Elevator Corp*., 954 F. Supp. 1459, 1463 (D. Colo. 1997). Further, the State is currently seeking to preclude Dr. Murphy's opinions and analysis as part of a motion in limine filed on May 18, 2009. *See* Dkt. #2074. This report, and all other unsworn expert reports submitted by Defendants, should be disregarded. In any event, Dr. Murphy's testimony indicates that: (a) he made errors in classifying -- and thus, counting -- the State's Cargill-related samples; and (b) he

recognizes that the State's Cargill-related samples could contain elevated levels of bacteria, nitrogen and phosphorus. Ex. 21 (Murphy Depo., pp. 242-52; 258; 259-67; 267-83).

14. The State's evidence demonstrates that runoff and/or infiltration from poultry waste generated by Cargill's birds has contributed to damage to the waters of the IRW. *See, e.g.*, Statement of Disp. Facts, ¶ 9, *supra.*

15. Dr. Robert Taylor determined costs Defendants avoided by not transporting poultry waste on a per ton basis, based upon various distances the waste would be transported during the period 1988-2008. Ex. 16 (Taylor Depo., pp. 164-65, 168-71, Dep. Ex. 2, p. 37-38, ¶¶ 78 & 79 & Table 4). Dr. Bernard Engel determined both the tonnage of waste produced by the Cargill Defendants, as well as their percentage of total waste production. *See* Dkt. #2076-8 (5/14/09 Engel Aff., ¶ 6). Using information determined by these experts, and other information available, costs avoided can be calculated for the Cargill Defendants. Cargill MSJ Ex. S: Taylor report, p. 39, ¶ 82.

Additional Facts Precluding Summary Judgment

1. Prior to 2005, Cargill contracted with an outside crew to come in with their own equipment, clean out the turkey facilities and spread the litter generated at Cargill's own breeder farm operations within the IRW. Ex. 17 (Delap Depo., pp. 29; 43-45); Ex. 18 (Alsup 6/08 Depo., pp. 169-70; 233; 244-45). Up until 2005, poultry waste generated at the breeder farms was always land applied by the contract crews "in the vicinity either on the property Cargill owned on the immediate property surrounding the breeder farms or on private property…" Delap at 43.

2. Cargill, Inc. is the parent company over its subsidiary, Cargill Turkey Production. Ex. 19 (Maupin Depo. at 302-03). Cargill Turkey Production has only been in existence since

June 2004. *Id.* at 8. Cargill, Inc. first entered the poultry production business in the IRW in the mid-1970s. *Id.* at 286. All Defendants -- including Cargill, Inc. -- have admitted that they are poultry integrators. Dkt. #2057 at 3.

ARGUMENT

I. The State's Causation Evidence Is More Than Adequate on All Claims at Issue in Cargill's MSJ

A. Causation May Properly Be Established by Circumstantial Evidence

As an initial matter, the Cargill Defendants' apparent contention that the State must prove causation by direct evidence (*e.g.*, edge-of-field sampling data) is simply wrong as a matter of law.[2] It is well established that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citation omitted). *See also Dillon v. Fibreboard Corp.*, 919 F.2d 1488, 1490 (10th Cir. 1990). As a matter of Oklahoma law, liability for contamination of water may properly be proved by circumstantial evidence.[3] Similarly, "CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct evidence." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000) (citations omitted). RCRA liability may also be established by circumstantial evidence. *See U.S. v. Valentine*, 856 F. Supp. 621, 627 (D.Wyo. 1994).[4]

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[2] The Cargill Defendants make several statements of alleged fact in the Argument portion of the MSJ that are attributed to various proffered experts retained by Cargill, citing to their unsworn expert reports. *See* MSJ at 7-8 (references to Murphy, Davis and Ginn); Dkt. ##2089; 2092-4 and 2095-4. Again, such unsworn reports are inadmissible summary judgment evidence and should be disregarded. *See Sofford*, 954 F. Supp. at 1463.

[3] *See California Oil Co. v. Davenport*, 435 P.2d 560, 563 (Okla. 1967); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 950-51 (Okla. 1957); *Peppers Refining Co. v. Spivey*, 285 P.2d 228, 231-32 (Okla. 1955) (trespass case).

[4] Contrary to the Cargill Defendants' view, the Tenth Circuit's recent decision in *Oklahoma v. Tyson Foods, Inc.*, -- F.3d --, 2009 WL 1313216 (10th Cir. May 13, 2009), does not

B. Summary of Cargill Causation Evidence Applicable to All Claims

As shown in the Statement of Disputed Material Facts, ¶ 9, *supra,* the State has gathered and presented ample circumstantial evidence to, at a minimum, create genuine issues of material fact with respect to causation. For instance, the State has gathered and presented: (1) evidence of the massive amounts of poultry waste annually generated by the Cargill Defendants' birds within the IRW; (2) evidence as to the number and location of active poultry houses within the IRW housing Cargill's birds; (3) evidence that the vast majority of poultry waste is land applied within the IRW in close proximity to the active houses where it is generated; (4) available soil test data showing that Cargill and Cargill growers have engaged in widespread disposal of poultry waste (far in excess of any agronomic need) within the IRW; (5) evidence that poultry waste is the number one source of phosphorus loading in the IRW; (6) scientific evidence showing that some portion of land-applied poultry waste is *always* transported from fields to waters; (7) a significant admission from Cargill regarding the transport of land-applied poultry waste; (8) evidence as to the geology of the IRW establishing ready pathways for the transport of

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support the proposition that the State's causation evidence is insufficient to survive summary judgment. First, the Circuit's decision in *Tyson Foods* was limited in scope to the issue of whether the extraordinary remedy of a mandatory preliminary injunction should have issued based upon the State's evidence that bacteria from land-applied poultry waste may present substantial endangerment to human health under RCRA.

The majority determined that this Court made a "choice between *two permissible views of the evidence*" in finding that "'the State ha[d] failed to meet the applicable standard of showing that the bacteria levels in the IRW can be traced to the application of poultry litter.'" *Tyson Foods, Inc.*, 2009 WL 1313216 at *16, n. 2 (internal quotation from *Oklahoma v. Tyson Foods, Inc.*, 2008 WL 4453098, at *4 (N.D. Okla. Sept. 29, 2008)) (emphasis added). The other "permissible view of the evidence" as referenced by the majority was set out in Judge Ebel's dissent. Judge Ebel determined that even without the testimony of Drs. Valerie Harwood and Roger Olsen, "the district court…had before it significant credible evidence tending to demonstrate land-applied poultry litter's risk to the IRW's waters and the people who use them." *Tyson Foods, Inc.*, 2009 WL 1313216, at *15 (dissent). Of course, neither this Court nor the Circuit had the benefit of the State's phosphorus evidence in the RCRA context. In any event, the "permissible view of the evidence" espoused by Judge Ebel shows that there are genuine disputed facts and that summary judgment is not appropriate.

phosphorus and bacteria from poultry waste to surface and groundwater; (9) numerous credible sources establishing that land-applied poultry waste is a significant source of pollution found in waters throughout the IRW; and (10) modeling evidence showing that approximately 59% of the phosphorus load ultimately reaching Lake Tenkiller is from land applied poultry waste. *See* Stat. of Dispt. Facts, ¶ 9, *supra.* In the interest of avoiding repetitive arguments and text, these ten points shall hereinafter be referred to as the "State's Summary of Cargill Causation Evidence."

C. CERCLA

The Cargill Defendants first argue that the State has failed to identify evidence that a CERCLA hazardous substance has been released from any farm owned or operated by Cargill or a Cargill grower. MSJ at 9.[5] The Cargill Defendants next argue that the land application of "turkey litter as fertilizer" by their employees and growers falls under "normal application of fertilizer" exception to CERCLA. *Id.* at 10. Cargill's arguments in this regard fail on both counts.

"Congress enacted CERCLA to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992). CERCLA "must be interpreted liberally so as to accomplish its remedial goals." *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004); *see also Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996) ("because CERCLA is remedial legislation, it should be construed liberally to carry out it purpose"). 42 U.S.C. § 9601(22) provides that: "The term "release" means *any* spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing

[5] The Cargill Defendants do *not* argue that there has been no "threatened release." This is fatal to their MSJ because CERCLA cost recovery liability is premised on whether there has been a "release or *threatened release* of a hazardous substance from a site which is a covered facility…" 42 U.S.C. § 9607(a).

into the environment . . . , but excludes . . . (D) the normal application of fertilizer." (Emphasis added.) "[C]ourts have construed CERCLA's definition of 'release' broadly." *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146, 1152 (1st Cir. 1989); *see also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989).

First, there is ample circumstantial evidence to demonstrate "releases" attributable to Cargill of a hazardous substance -- phosphorus -- into the environment of the IRW. *See* "State's Summary of Cargill Causation Evidence"; Stat. of Dispt. Facts, ¶ 9, *supra*. This evidence demonstrates that the widespread disposal of tens of thousands of tons of poultry waste from Cargill's birds on the sensitive terrain of the IRW assures that releases of phosphorus (a CERCLA hazardous substance) to the waters of the IRW have occurred. Indeed, this land disposal of poultry waste is itself a massive-scale release into the environment. At the very least, it can be inferred from this evidence that significant material issues of fact exist as to whether releases -- or threatened releases -- attributable to Cargill have occurred.

Second, the evidence as to the disposal of poultry waste by Cargill and Cargill growers establishes that Cargill's land application practices cannot rightly be classified as the "normal application of fertilizer." "[E]xceptions to CERCLA liability should . . . be narrowly construed." *See Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989). Although CERCLA does not define the term "the normal application of fertilizer," CERCLA's legislative history reveals that it was Congress's intent that this exception be limited to *agronomic* use of fertilizers.[6] The Senate Report pertaining to this exception explains: "The term 'normal field application' means the act of putting fertilizer on crops or cropland, and *does not mean any dumping, spilling, or*

[6] *See United States v. Tropical Fruit, S.E.*, 96 F. Supp. 2d 71, 88 (D.P.R. 2000) (construing FIFRA provision regarding "application of a pesticide" as meaning "the placement for effect of a pesticide at or on the site where the pest control or other response is desired").

emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops." S. Rep. No. 96-848, at 46 (1980) (emphasis added).[7]

The general rule is that the party seeking the benefits of a statutory exception bears the burden of proof on the applicability of the exception. *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967). The Cargill Defendants have presented no evidence that the land application of poultry waste from their birds falls under the "normal application of fertilizer" exception to a CERCLA "release." On the contrary, the evidence is that poultry waste from Cargill's birds is being applied in "significantly greater concentrations or amounts than are beneficial to crops." S. Rep. No. 96-848, at 46 (1980). *See* Stat. of Dispt. Facts, ¶ 9, *supra*. Under these circumstances, poultry waste is not "fertilizer" at all -- it is a simply waste being disposed of. Thus, the land application of poultry waste generated by Cargill's birds cannot be the "normal application of fertilizer."

The Cargill Defendants also argue that even assuming that a "release" occurred, the State cannot demonstrate CERCLA causation. MSJ at 10. More specifically, the Cargill Defendants assert that "a multi-site CERCLA claim requires a plaintiff to prove that a particular defendant's release actually caused the response costs." *Id.*[8] The Tenth Circuit has held that "[t]he plaintiff in a CERCLA response cost recovery action involving multiple potentially responsible persons *need not prove a specific causal link* between costs incurred and an individual responsible person's waste." *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 891 (10th Cir. 2000) (emphasis

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[7] "Because the House concurred in the Senate bill without amendment, *see* 126 Cong. Rec. 31, 950-82 (1980), the Senate report is powerful evidence of congressional intent." *Colorado v. Dept. of Interior*, 880 F.2d 481, 487 (D.C. Cir. 1989).

[8] While it is not entirely clear what the Cargill Defendants mean by "multi-site CERCLA claim"; here, the State alleges that the entire IRW is a single "facility" or "site".

added) (citation omitted). Further, the *Tosco* case importantly involved causation arguments in the context of hazardous substances that had migrated from the soils into groundwater. *Id.* at 893. Here, the evidence is that poultry waste from Cargill's birds has been disposed of in large quantities on the fractured terrain of the IRW -- with easy pathways to surface and groundwater, such that phosphorus has necessarily been released -- contributing to elevated phosphorus levels found in the water bodies of the IRW. Under such circumstances, the State need not "tie specific response costs to hazardous waste identified as [Cargill's], alone." *Id.* Summary judgment should not be granted in favor of Cargill on the State's CERCLA cost recovery claim.

The Cargill Defendants next posit that summary judgment should be granted on the State's CERCLA Natural Resource Damages ("NRD") claim because the State cannot show that any damage resulted from a non-*de minimis* Cargill-related release. MSJ at 12. Under §9607(a)(4)(c), NRD trustees seeking restoration must prove injury to natural resources "resulting from" a release of a hazardous substance. In *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp.2d 1094, 1124 (D. Idaho 2003) -- a decision cited by the Cargill Defendants -- the court held that where hazardous substances from multiple defendants have commingled, the plaintiff trustee has the burden of proving that each defendant's release is more than a *de minimis* "contributing factor" to the natural resource injuries alleged by the trustee. The State's causation evidence establishes that land applied poultry waste from Cargill's birds is more than a *de minimis* "contributing factor" to the pollution of IRW waters. *See, e.g.*, "State's Summary of Cargill Causation Evidence," *supra*. Summary judgment should be denied.

D. RCRA

Next, the Cargill Defendants propose that summary judgment is appropriate with respect to the State's RCRA claim because the State has failed to identify any evidence that either

Cargill Defendant is a "contributor" under RCRA. MSJ at 12. The scope of "contributor" liability under RCRA is extremely broad, and the State need merely show that the Cargill Defendants "have a part or share in producing an effect." *See Cox v. City of Dallas, Texas*, 256 F.3d 281, 294-95 (5th Cir. 2001) (citing *United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) and *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)).

A defendant need not have a direct hand in the disposal of solid waste in order to be encompassed within the expansive reach of "contributor" liability under RCRA: "lax" oversight of a contractor's disposal practices can be enough. *See Cox*, 256 F.3d at 296-97 (citations omitted). *See also Aceto*, 872 F.2d at 1383; *Valentine*, 885 F. Supp. at 1512. As shown in the "State's Summary of Cargill Causation Evidence" and Statement of Disputed Material Facts, ¶ 9, *supra*, enormous quantities of bacteria and phosphorus-laden poultry waste from the Cargill Defendants' birds have been disposed of in a very limited geographical region that is highly susceptible to water pollution. And there is additional evidence that the Cargill Defendants "contributed or…[are] contributing" to that disposal. To wit, the Cargill Defendants: (1) dictate all essential aspects of poultry production, including clean outs, *see* Stat. of Disp. Facts, ¶¶ 2 & 3; (2) promote the use of the waste from their birds in spite of the fact that it is high in phosphorus and bacteria and has been over applied, *see* Stat. of Disp. Facts, ¶¶ 2, 3 and 9; (3) can and do influence the land application of these wastes, *id.*; and (4) strongly influence the timing, location and amount of poultry waste disposal in the IRW, *id.* These facts taken together clearly demonstrate that the Cargill Defendants "have a part or share in producing" not only the enormous volumes of poultry waste, but also the circumstances and manner in which that poultry

waste is handled and disposed of in the IRW. The Cargill Defendants are thus "contributors" within the meaning of RCRA. The Cargill Defendants' MSJ on this issue should be denied.

E. Nuisance and Trespass

The Cargill Defendants also aver that the State's nuisance and trespass claims fail for lack of Cargill-specific causation evidence. MSJ at 13-14. However, the State's causation evidence is more than adequate to defeat summary judgment as a matter of Oklahoma tort law. Under Oklahoma law, when multiple tortfeasors' acts concur, combine, or commingle to produce an indivisible injury, they may be held jointly and severally liable even in the absence of concerted action. *See Boyles v. Okla. Natural Gas*, 619 P.2d 613, 617 (Okla. 1980). "With respect to environmental nuisances, such as pollution of a stream or pollution of the air surrounding a community, courts have commonly found that such pollution constitutes an indivisible injury." *Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27381, at *41 (N.D. Okla. July 11, 2003), *vacated in part by Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004)[9] (citing *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995), *Harper-Turner Oil Co.*, 311 P.2d at 950-51 and *U.S. v. Pess*, 120 F.Supp.2d 503 (W.D. Pa. 2000)).

Oklahoma's "indivisible injury" doctrine is clearly applicable in the case at bar. Indeed, Judge Eagan applied Oklahoma's indivisible injury authorities in *City of Tulsa v. Tyson Foods*, a case that undeniably parallels the instant action. In *City of Tulsa*, the Court found:

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[9] After a settlement was entered among the *Herd* plaintiffs and defendants Blue Tee Corp. and Gold Fields Mining Corp., the July 11, 2003 order was vacated as to *those two defendants only*. *See Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004); and 01-CV-891-H(C), Dkt. #737. The vacation order was entered pursuant to unopposed motion. *See Herd*, 01-CV-891-H(C), Dkt. #747. The July 11, 2003 order regarding causation was not withdrawn nor its legal reasoning altered in any way.

> The injury alleged herein is a single, indivisible injury - the eutrophication of the lakes from excess phosphorus loading. Under Oklahoma…law, regardless of whether the claim is one of negligence or intentional tort, where there are multiple tortfeasors and the separate and independent acts of codefendants concurred, commingled and combined to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.

City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003), *vacated in connection with settlement* (citations and internal quotations omitted).[10] In denying the defendants' causation motion for summary judgment in the *City of Tulsa* case, Judge Eagan further determined that: (1) "plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant"; and (2) "plaintiffs must show that each defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs." *Id.* at 1300.

Here, the State alleges a single, indivisible injury of contamination of the water bodies of the IRW with excessive nutrients and pathogenic bacteria. The State further alleges that the Defendants are multiple tortfeasors whose separate and independent acts -- involving foreseeable land disposal of poultry waste -- have concurred, commingled and combined to produce this single indivisible injury. Thus, the State "need not prove the portion or quantity of harm of damages caused by each particular" Defendant. In their MSJ, the Cargill Defendants seem to argue that the State must track or trace the alleged movement of bacteria and phosphorus from specific fields where poultry waste from Cargill's birds was land applied to the water bodies of

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[10] The *City of Tulsa* summary judgment order should be viewed as persuasive authority. That order was vacated by unopposed motion solely as part of the settlement of that action. *See City of Tulsa*, 01-CV-0900-EA(C), Dkt. ##472 and 473 ¶ 8. It was not vacated as a result of a motion for reconsideration or any stated need to correct or negate the substance of the opinion. The *City of Tulsa* opinion is a public act of the government which cannot be expunged by private agreement. *See Oklahoma Radio Associates v. Magnolia Broadcasting Co.*, 3 F.3d 1436, 1444 (10th Cir. 1993) (citations omitted). The order is available in the Federal Supplement, Second Series, contains extensive reasoning on issues pertinent to this action, and may be helpful to this Court to the extent it finds that reasoning persuasive.

the IRW. But Oklahoma law imposes no such causation standard in cases such as this. The *Herd* decision is highly informative in this regard.

In denying the defendants' various motions for summary judgment regarding causation, the *Herd* Court held and reasoned as follows:

> Once the lead-laden dust reaches the air stream, it is impossible to trace its precise source. The Court therefore finds that the alleged injury is indivisible and that the … legal principles regarding joint and several liability apply. To the extent Defendants argue that they are entitled to summary judgment on grounds that Plaintiffs have failed to allege facts that 'trace' or 'quantify' the lead-laden dust causing the alleged nuisance in this case as to each individual Defendant's chat pile(s) or tailing pond(s), the Court finds that, under the facts present here, such tracing or quantification is not required.

Herd, 2003 U.S. Dist. LEXIS 27381, at *41-42; *see also id.* at 44-46. The *Herd* decision is on point. In this case, it is simply not possible for the State to trace or pinpoint the precise source of each molecule of phosphorus or bacteria that has made its way to the waters of the IRW. And the State is not required to do so as a matter of law. As shown throughout this Response, the State has presented substantial circumstantial evidence that waste from the Cargill Defendants' birds has contributed to the widespread contamination of the waters of the IRW. This is all that is required.

F. State Statutory Claims

Under 27A Okla. Stat. § 2-6-105, Defendants can be liable for creating a public nuisance if the State proves that they have "cause[d] pollution of any waters of the state or . . . place[d] or cause[d] to be placed any wastes in a location where they <u>are likely to cause pollution</u> of any air, land or waters of the state." *See* 27A Okla. Stat. § 2-6-105(A) (emphasis added). The State also claims that Defendants have violated the Oklahoma Registered Poultry Feeding Operations Act, *see* 2 Okla. Stat. § 10-9 *et seq.*, which requires that there shall be no "runoff of waste from the application site" and "[p]oultry waste handling, treatment, management and removal shall[] not

create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (4)(b). Plainly, the State has presented sufficient evidence to create a genuine issue of fact as to whether poultry waste for which the Cargill Defendants are responsible has been placed or caused to be placed in the Oklahoma portion of the IRW -- in sufficient quantities -- such that constituents of concern from that waste is likely to cause pollution to the waters of the IRW. *See, e.g.,* "State's Summary of Cargill Causation Evidence," Stat. of Disp. Facts, ¶ 9, *supra.* And ample circumstantial evidence tends to prove that poultry waste from the Cargill Defendants' birds has run off of waste application sites, and the evidence of highly elevated STP levels on fields linked to Cargill indicates that the handling of this waste has created an environmental or public health hazard. *Id.* Summary judgment is not appropriate in Cargill's favor on these Oklahoma statutory claims.

II. Summary Judgment Should *Not* Be Granted in Favor of the Cargill Defendants on the Issue of CERCLA "Operator" and "Arranger" Liability

First, it should be emphasized that the Cargill Defendants make no argument that they are not CERCLA-covered persons as "owners" and "operators" of the Cargill "breeder" farms located within the IRW. MSJ at 16 n.4. Instead, the Cargill Defendants claim that they are not "owners," "operators" or "arrangers" with respect to their growers' farms and disposal practices. *Id.* at 16-21. The State's CERCLA claims with respect to the growers' operations and practices are premised on Defendants' status as "operators" and "arrangers."

In order to be "operators" of the grower facilities for the purposes of CERCLA, the evidence must show that the Cargill Defendants "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *U.S. v. Bestfoods,* 524 U.S. 51, 66-67 (1998). The Cargill Defendants argue that they are not

"operators" under *Bestfoods* because they "exercised no direction or control over the disposition of the Growers' turkey litter." MSJ at 18. However, the Cargill Defendants exercise control over most aspects of the grower facility operations (including with respect to grower disposal practices), are clearly in a position of responsibility and power with respect to each grower facility and are in a position to make a timely discovery of poultry waste disposal and to prevent and abate environmental damage. *See* Stat. of Disp. Facts ¶¶ 2 & 3. Under such circumstances, the Cargill Defendants are "operators" under CERCLA. *See Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 721 (W.D. Ky. 2003) (finding that Tyson was an "operator" of contract grower facilities under *Bestfoods*).[11]

The Cargill Defendants also claim that they are not "arrangers" under CERCLA § 9607(a)(3). Cargill's first argument in this regard is easily defeated. Specifically, the Cargill Defendants assert that they cannot be "arrangers" with respect to the breeder farms because they had no "arrangement with anyone" concerning disposal of the waste generated there and that "whatever was done with the litter, Cargill did on its own without 'arranging' anything with anyone else…" MSJ at 20. This argument is blatantly contrary to the sworn testimony of Cargill's own 30(b)(6) witness and the former manager of the breeder farm facilities that Cargill contracted with a third party to clean out the breeder farm houses and dispose of the poultry waste generated there. *See* Stat. of Addt'l Facts, ¶ 1, *supra.* Thus, summary judgment is plainly not warranted in favor of Cargill with respect to the breeder farms.

In arguing that they are not "arrangers" with respect their growers, the Cargill Defendants rely heavily upon the Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, Nos. 07-1601 and 07-1607, 556 U.S. __, 2009 U.S. LEXIS 3306

[11] *See also Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 808-09 (Ala. 2000) (finding contract swine growers to be Tyson's agents under state law).

(May 4, 2009). MSJ at 18-19. In *Burlington Northern*, the Court held that, "under the plain language of the statute, an entity may qualify as an arranger under [42 U.S.C.] §9607(a)(3) when it takes *intentional* steps to dispose of a hazardous substance." 2009 U.S. LEXIS, at *20 (emphasis added). The *Burlington Northern* Court further concluded that defendant Shell was not an "arranger" under the articulated standard -- even though Shell had knowledge that its pesticide products had leaked while being shipped by a common carrier. *Id.* at *7-8. The *Burlington Northern* Court reasoned that:

> While it is true that *in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes*, knowledge alone is insufficient to prove that an entity 'planned for' the disposal, *particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.*

2009 U.S. LEXIS 3306, at *22 (emphasis added).

The State asserts that one such "instance[] [in which] an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded" provides "evidence of the entity's intent to dispose of its hazardous wastes" can be found in *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989). In *Aceto*, the plaintiffs claimed that pesticide manufacturers were liable for cleaning up the site of a formulating company that they had hired to formulate their technical grade pesticides into commercial grade pesticides. The Eighth Circuit looked beyond the defendants' characterization of their relationship with the formulator "as pertaining solely to formulation of a useful product" and affirmed the district court's judgment denying the defendants' motion to dismiss. *Id.* at 1381-82. "Any other decision," the court said, "would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA." *Id.*

Although "knowledge alone is insufficient to prove that an entity 'planned for' the disposal" under *Burlington Northern*, the *Aceto* case involved knowledge, ownership, and an economic incentive to avoid the burden of dealing with spillage that is an inherent and unavoidable byproduct of the manufacture of a product -- not the product itself. *See Aceto*, 872 F.2d at 1381. By outsourcing the formulation process, the pesticide manufacturer intended to put another entity in the position of spilling (i.e., disposing of) its waste product.[12] Poultry waste generated by its birds is not an "unused, useful" product to the Cargill Defendants. It is an unwanted byproduct in the profitable business of growing Cargill's birds. The State's evidence shows that the Cargill Defendants know that this waste is predominantly land applied by its growers -- and even that the Cargill Defendants specify clean-out and cake-out procedures with respect to the waste. The STP data shows that this waste has been disposed of on fields in the IRW far in excess of any agronomic needs of the crops. Further, the Cargill Defendants have used their economic control over the growers to shift their environmental costs from themselves to the growers. Ex. 20 (6/09 Taylor Decl., ¶¶ 34-40). In essence, the Cargill Defendants have knowingly outsourced disposal duties of a waste to the growers -- thereby allowing Cargill to avoid the cost of disposal of this waste itself. This is sufficient evidence of "intent" under *Burlington Northern*, and summary judgment should be denied.

III. The Cargill Defendants Are Not Entitled to Summary Judgment on the State's Unjust Enrichment Claim

The Cargill Defendants recognize, and do not dispute, that a claim of unjust enrichment can require a defendant to disgorge all unjust gains flowing from the wrong committed. *See* MSJ

[12] In contrast, in *Burlington Northern*, the Supreme Court rejected the notion that Congress "intended to impose liability on entities not only when they directly dispose of waste products but also when they engage in legitimate sales of hazardous substances knowing that some disposal may occur as a collateral consequence of the sale itself." 2009 U.S. LEXIS 3306, at *21.

at 22. The Cargill Defendants also recognize that "disgorgement" is the act of giving up something (such as profits illegally obtained) on demand or legal compulsion. *Id.* The Cargill Defendants seek summary judgment, not because they have not acted unjustly, but based upon the erroneous premise that the State cannot establish the amount of *their* unjust enrichment, as opposed to the aggregate unjust enrichment of all of the Defendants. *Id.* The Cargill Defendants admit that Dr. Taylor's report indicated that costs saved can be calculated for individual Defendants (*see* MSJ, p. 23; Dkt. #2091-6, ¶ 82), but evidently did not depose Dr. Taylor on that point. As shown in Statement of Disputed Material Facts, ¶ 15, *supra*, with Dr. Taylor's cost savings data, coupled with the State's evidence of the amount of waste generated by the Cargill Defendants, the Court can determine the amount of unjust enrichment enjoyed by the Cargill Defendants without the need of expert testimony. The fact that Dr. Taylor did not make this simple calculation himself is not grounds for summary judgment.

IV. The State Has Standing to Pursue Prospective Injunctive Relief Against Cargill, Inc.

The Cargill Defendants claim that because Cargill, Inc, has no current poultry operations in the IRW, the State has no standing to seek prospective injunctive relief against Cargill, Inc. MSJ at 24-5. What the Cargill Defendants do not mention however, is that Cargill, Inc. had poultry operations in the IRW for approximately thirty years before its subsidiary Cargill Turkey Production was created to assume those operations. *See* Stat. of Add'l Facts, ¶ 2, *supra.* Cargill, Inc. ceased its operations in the IRW in June 2004 -- one year before the instant litigation was filed. *Id.* Of course, the State has alleged that Cargill, Inc.'s operations in the IRW have caused damage to the environment in violation federal and state law. First of all, Cargill, Inc. clearly would be rightfully be enjoined with respect to the cleanup and abatement in connection with its prior operations. Further, "[v]oluntary cessation of unlawful activity does not moot every

request for prospective relief; the court must decide whether the complained-of conduct may be resumed." *Vincent v. City Colleges of Chicago*, 485 F.3d 919, 925 (7thCir. 2007) (citations omitted). The Tenth Circuit has recognized that "[w]hen defendants are shown to have settled into a continuing practice ..., courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 865 (10thCir. 2003) (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 n. 5 (1953)). Here, the long history of Cargill, Inc.'s operations in this watershed, and the timing of its cessation of those operations, caution against shielding it from prospective relief. If the Court were to grant an injunction against Cargill Turkey Production only, there would be nothing to prevent Cargill, Inc. -- which still refers to itself as a "poultry integrator" -- from simply resuming the long-standing conduct which the State seeks to enjoin. Under these present facts, the State has standing to seek prospective relief against Cargill, Inc., and the MSJ should be denied.

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